

***United States Court of Appeals
for the Second Circuit***

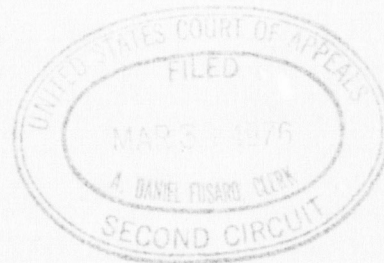


APPELLEE'S BRIEF

75-7366

United States Court of Appeals
For the Second Circuit

No. 75-7366



DON R. DASEK *et al.*,
Plaintiffs-Appellants,

vs.

ABRAHAM & CO., INC., *et al.*
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES
ABRAHAM & CO., INC., *et al.*

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ABRAHAM & CO., INC., et al.,

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BRIEF OF DEFENDANTS-APPELLEES
ABRAHAM & CO., INC., et al.

STATEMENT OF THE CASE

This is an appeal by the Plaintiffs from an Order of the United States District Court for the Southern District of New York (Wyatt, J.) granting the motion of Defendants ABRAHAM & CO., INC. and JOSEPH A. GOTTLIEB to stay, as against said Defendants, the prosecution of this action pending a final determination of two arbitration proceedings, to which the Plaintiffs and ABRAHAM & CO., INC. were parties, pending before and being jointly administered by the American Arbitration Association (A-121). Judge Wyatt's Opinion (A-101-105) has not been published.

The Plaintiffs are individuals and partners, in varying combinations, of DASEKE OPTION ASSOCIATES and DASEKE INVESTMENT ASSOCIATES. The Plaintiff, DON R. DASEKE, is chief officer of OPTION ACCOUNT SERVICE, INC., an investment advisor registered with the Securities and Exchange Commission and a

principal and chief officer of DASEKE & CO., INC., a member of the NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. Mr. Daseke is experienced, knowledgeable and sophisticated in financial matters (A-101), and was the chief figure involved in the dealings giving rise to this litigation.

In June, 1973 Plaintiffs opened, on margin, option writing accounts with ABRAHAM & CO., INC. ("ABRAHAM"), a registered broker-dealer and member corporation of the New York Stock Exchange (A-24). The accounts were introduced to ABRAHAM by MERKIN & CO., INC. ("MERKIN"), a registered broker-dealer and a member corporation of the New York Stock Exchange (A-24). Prior to establishing these option writing accounts with ABRAHAM, DASEKE OPTION ASSOCIATES ("DOA") and DASEKE INVESTMENT ASSOCIATES ("DIA") had maintained them with ADVEST CO. (A-74). The accounts were transferred from ADVEST CO. to ABRAHAM when the registered representative with whom DASEKE dealt left ADVEST and joined MERKIN (A-74,75).

Upon the opening of the accounts, ABRAHAM's standard forms of margin account agreements were executed (A-75, 76) by the Plaintiffs. Thereafter all transactions executed in the accounts were confirmed to the Plaintiffs by ABRAHAM (A-76) and the monthly Statements of the accounts were issued to the Plaintiffs by ABRAHAM.

In May, 1974, when the Plaintiffs' accounts had fallen below the applicable margin requirements, ABRAHAM made demand upon the Plaintiffs for additional margin, and when such demand brought no responsive action, took corrective action by executing liquidating transactions in the accounts

(A-40). Plaintiffs thereupon wrote to ABRAHAM (A-81), advising ABRAHAM of Plaintiffs' decision, taken on the advice of counsel, not to seek an injunction but to pursue an action for damages against ABRAHAM.

On June 20, 1974, when again Plaintiffs' accounts became undermargined, ABRAHAM, by letter to the Plaintiffs (A-82), demanded payment of its margin loans which, as of that date, aggregated, without interest, more than \$276,000.00.* In the alternative, ABRAHAM offered to accept additional margin in the sum of \$241,000.00 which it deemed necessary properly to margin the accounts. ABRAHAM's letter concluded with the advice to the Plaintiffs that upon their failure to comply with one or the other of the alternatives, ABRAHAM would seek enforcement of its rights by the submission of its claim to arbitration. Plaintiffs, in executing the account agreement with ABRAHAM, had agreed to arbitration as the medium for the resolution of disputes (A-35).

Plaintiffs did not respond to ABRAHAM's demand but, instead, wrote to the American Arbitration Association (A-48) to advise it that they had elected to settle their disputes with ABRAHAM by arbitration, and that the disputes arose under margin account agreements providing for arbitration. A copy of the arbitration provision contained in the account agreements was enclosed with the Plaintiffs' letter, and a copy of the letter was dispatched to ABRAHAM. Following the

* These margin loans were payable on demand by the terms of the margin agreements between the parties (A-34).

receipt of notice of Plaintiffs' election to arbitrate before the American Arbitration Association ("AAA"), ABRAHAM commenced before the AAA a proceeding against the principals of DOA (but not DIA), seeking recovery of the then debit balance in DOA's account. The Plaintiffs, who then and for some time had been advised by counsel with respect to their dealings with ABRAHAM (A-81), answered ABRAHAM's claim by such counsel. Simultaneously with the submission of their answer to ABRAHAM's claim, Plaintiffs, under cover of their counsel's letter to the AAA (A-46), initiated (not alone with respect to DOA, the Respondent in ABRAHAM's proceeding, but in respect to DIA also) a proceeding (A-50-57) against ABRAHAM and MERKIN alleging violations of the Securities Exchange Act of 1934, Regulation T of the Board of Governors of the Federal Reserve System promulgated under such Act, the rules, regulations, customs and usages of the New York Stock Exchange and the Chicago Board of Options, and a variety of other claims, some justiciable under the securities acts and others as statutory or common law causes of action, i.e., breach of contract and negligence. ABRAHAM thereupon answered the Plaintiffs' arbitration claim (A-58-60).

In the July 12, 1974 letter of Plaintiffs' counsel to the AAA which covered Plaintiffs' answer to ABRAHAM's claim in respect of DOA and the Plaintiffs' claims in respect of DOA and DIA, he suggested that the proceedings be joined, and returned to the American Arbitration Association the Plaintiffs' responses to the Associations's request for

information with respect to the dates which would be satisfactory for hearing, his time estimate, and the AAA's list of arbitrators with the Plaintiffs' preferences noted thereon. Plaintiffs' counsel advised the AAA that such information would be applicable also to the Plaintiffs' arbitration claim.

On August 16, 1974, the AAA announced the appointment of the first arbitrator and submitted to the parties a second and final list of proposed arbitrators.

In early September, 1974, MERKIN applied to the New York Supreme Court for an Order staying the arbitration proceeding which the Plaintiffs had instituted against it, and the AAA thereupon wrote to Plaintiffs' counsel and to ABRAHAM asking whether they wished to proceed with the arbitration pending between them or to hold them in abeyance pending the resolution of the MERKIN application (A-63). To this, Plaintiffs' counsel replied, on September 9, 1974, that so far as Plaintiffs were concerned, such counsel was willing to hold the ABRAHAM arbitrations in abeyance pending the resolution of MERKIN's application for a stay (A-65).

Thus matters stood until the middle of November, 1974, when the Plaintiffs apparently experienced a "change of heart" and concluded that their interests might better be served by the institution of this action. Plaintiffs thereupon consented to MERKIN's application (A-29, A-79,80) and Plaintiffs' counsel attempted, unilaterally, to withdraw the arbitrations from the AAA (A-65). ABRAHAM advised the Association that it

would resist the Plaintiffs' efforts to withdraw the pending matters from the Association's competence (A-66).

The complaint in this action is nothing more than a dressed-up version of the Plaintiffs' arbitration claim and the issues raised in this action are identical to those which the Plaintiffs submitted to arbitration.

ARGUMENT

I.

The Applicable Law

So far as relevant to this appeal, the United States Arbitration Act, 9 U.S.C. §§2-4, provides as follows:

"§2. Validity, irrevocability, and enforcement of agreements to arbitrate. ... an agreement in writing to submit to arbitration an existing controversy arising out of [a contract involving commerce] ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [Emphasis added]

"§3. Stay or proceedings where issue therein referable to arbitration. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

"§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration ... A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction

under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement ..."

Since, as the Court below found, the Plaintiffs had agreed to arbitrate their disputes with ABRAHAM, their agreement to arbitrate was enforceable under the Arbitration Act and this action was properly stayed.

II.

The Plaintiffs Agreed to Arbitrate an Existing Controversy and There Is No Public Policy Which Dictates That Such Agreement Should Not Be Enforced.

The Plaintiffs, on this appeal, would seek to persuade this Court that only proceedings at law are appropriate for the resolution of disputes involving aspects of the securities acts. In taking this position, Plaintiffs fly in the face of this Court's own decisions in Coenen v. R. W. Pressprich & Co., 453 F.2d 1209 (2d Cir. 1972), and Axelrod & Co. v. Kordich, Victor & Neufeld, 451 F.2d 838 (2d Cir. 1971), the decision of the Fifth Circuit in Gardner v. Shearson, Hammill & Co., 433 F.2d 367 (5th Cir. 1970), and of the Third Circuit in Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242 (3d Cir. 1968), and of numerous District Court decisions. The only question on this appeal is whether Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1957) operates to relieve the Plaintiffs of their agreement to arbitrate their disputes with ABRAHAM. We submit that

there is nothing in Wilko v. Swan that supports the Plaintiffs' position.

As this Court pointed out in Coenen, the Supreme Court, in Wilko v. Swan, held only that Section 14 of the Securities Act of 1933, 15 U.S.C. Section 77n (the counterpart of Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78cc) rendered unenforceable an advance agreement to arbitrate claims cognizable under the Securities Act. The rationale of Wilko v. Swan, this Court said, was that the undertaking to arbitrate, made before any controversy between the parties arose, could not restrict the Plaintiff in his choice of a forum. In distinguishing the Coenen case from Wilko v. Swan, this Court pointed out that the Supreme Court had left open the question of the enforceability of an agreement to arbitrate made after the dispute had arisen, that the facts in Coenen were of such character, and that agreements to arbitrate, concluded after a dispute had arisen, were valid.

In construing Wilko v. Swan to proscribe only arbitration agreements made in advance of the existence of a dispute, this Court was doing no more than what had been done in decisions in earlier cases in respect of the equally strong policy of the law for violations of the antitrust laws. American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968), Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970).

In Lawson Fabrics, Inc. v. Akzona, Incorporated, 355 F.Supp. 1146 (S.D.N.Y. 1973), Affd. 486 F.2d 1394 (2d Cir. 1973), the Court concluded that whether, as under the securities acts, the issues arose because of an express prohibition against advance waivers of the right to sue or under other statutes, where the advance waiver of a right to sue, though not explicitly prohibited, was prohibited because the statute was infused with a policy against such advance waivers (as in the case of the Sherman and Clayton Acts), public policy did not militate against agreements to arbitrate existing disputes as an exception to the prohibition. The Court, in Lawson Fabrics, Inc. v. Akzona, Incorporated, 355 F.Supp. supra 1150, stated the rationale as follows:

"***The underlying reasoning of the courts in creating this exception rests on the view that since a party has the power to settle an existing dispute, it follows that a party can agree to arbitrate an existing controversy because it is, in effect, a decision to have the case settled, though by an independent non-legal third party.

Further, the main objection which arises where future controversies are involved, namely, that a party is signing away an unknown claim or right, does not apply. Both parties in this situation have the opportunity to know exactly what they are agreeing to arbitrate, and it is less likely that the respective bargaining positions will be influenced by factors not related to the existing controversy."

The question on this appeal is whether the Plaintiffs, after their dispute with ABRAHAM had arisen, agreed to arbitrate that dispute. The Court below held that they had and, on the facts before it, could have reached no other conclu-

sion. However, before addressing ourselves to that point, we wish to point out that the Plaintiffs are, in reality, not of the class of intended beneficiaries of the statutory policy of the securities acts.

The policy which underlies the prohibition against advance waivers of the right to sue under the securities acts is that the customer, on the one hand, and the broker-dealer, on the other hand, are unevenly matched. Presumably, the broker is more knowledgeable, more sophisticated and more powerful, and uses its superior bargaining position to compel the customer, by the agreement to arbitrate, to waive rights conferred upon him by the applicable statutes. While DON DASEKE, who managed the Plaintiffs' dealings with ABRAHAM, was a customer of ABRAHAM, he was sophisticated in the ways of the marketplace and, judging by the magnitude of the securities positions taken, valued at over a million dollars at a low ebb of the market (A-40), not lacking in economic strength. Obviously, DASEKE was not at the mercy of any single broker. Plaintiffs' accounts had already been transferred from ADVEST to ABRAHAM to suit DASEKE's convenience and no doubt could have been transferred elsewhere as well. It is interesting to note that one of DASEKE's companies, DASEKE & CO., INC., is a member of the National Association of Securities Dealers, and that by the Securities Exchange Act of 1934, as amended by the Securities Acts Amendments of 1975 (Public Law 94-29), the prohibition against waiver contained in Section 29a of the Exchange Act

would be inapplicable to disputes which DASEKE might have had with ABRAHAM with respect to such company's dealings in over-the-counter securities since, both being members of the National Association of Securities Dealers, Inc., agreements to arbitrate disputes under the rules of such Association would not be denied binding effect (Securities Exchange Act of 1934, Section 28(b)).

III.

The Plaintiffs Undertook to Arbitrate
With Full Knowledge of the Nature and
Dimension of Their Dispute with
ABRAHAM.

The Plaintiffs, on brief, do not appear to deny that they agreed to arbitrate but, rather, appear to seek to be relieved of that agreement by suggesting that they were coerced into arbitration and that the proceedings were not voluntarily initiated by them (Plaintiffs' Brief, p. 15).

So far as the coercion argument is concerned, it will be noted that from the outset the entire initiative was with the Plaintiffs. As early as May 29, 1974 (A-81), a month before ABRAHAM even stated an intention to arbitrate if Plaintiffs' margin debits were not cleared or adequately funded (A-97), Plaintiffs were considering with their counsel what course of action they were going to institute against ABRAHAM, and they advised ABRAHAM that they had decided not to seek an injunction but to seek dollar damages by their action for damages. When, on June 20, 1974 (A-82), ABRAHAM

advised that it would take action by way of arbitration proceeding to enforce payment by the Plaintiffs, if it were not made voluntarily, Plaintiffs answered by their letter to the AAA of June 26, 1974 (A-48) electing arbitration, notifying ABRAHAM of such election (A-92).

A substantially similar contention was advanced in Lawson Fabrics, Inc. v. Akzona, Incorporated, supra. The Court disposed of that contention, saying (p. 1150);

"It is suggested that even if the Federal claims are included within the demand, that the demand does not represent a free decision on the part of plaintiff since he was compelled to arbitrate by the clause in the contract. If the demand were coerced, no waiver could be found. However, I find that the existence of the arbitration clause was not sufficiently coercive to negate the request. Plaintiff argues that he had no choice but to demand arbitration since the contract called for all disputes to be arbitrated. However, there were several other choices besides a blanket demand open to plaintiff. Obviously, plaintiff could have sought to narrow his demand for arbitration by limiting the scope so as to expressly not include these statutory claims. Indeed, if plaintiff had wanted to avoid arbitrating these issues, he would have been better advised to have brought the Federal action. Lastly, plaintiff could have forced defendant to bring the arbitration and not have filed for it at all."

"Thus we find that this demand was sufficiently without coercion, so as to represent an agreement to arbitrate an existing controversy and that, therefore, the Federal action in this case should be stayed as to defendant Blanchard pending the arbitration determination."

So far as initiation of the arbitration is concerned, it will be noted that the arbitration claim asserted by ABRAHAM was asserted only against DOA, whereas the Plain-

tiffs initiated arbitrations on behalf of DIA as well as DOA (A-50). It is particularly noteworthy that in its demand for arbitration addressed to the AAA on behalf of both entities, the Plaintiffs claimed (A-50) to have instituted the arbitration proceeding by their letter of June 26, 1974. It ill becomes the Plaintiffs now to contend that the arbitration was not initiated by them in the face of their own claim to the AAA that it was.

In Lawson Fabrics, Inc. v. Akzona, Incorporated, supra, as here, the Plaintiffs first initiated an arbitration proceeding and then began a Federal Court action. But the totality of the facts in the instant case are even more compelling than those in Lawson. In all, Plaintiffs, after the dispute arose, took the following actions with respect to the arbitration of this controversy: (1) they declared in writing their decision to have this controversy determined by arbitration before the AAA; (2) they accepted the jurisdiction of the AAA in the proceeding initiated by ABRAHAM and filed an itemized Answer to the Statement of Claim filed by ABRAHAM; (3) they initiated a second arbitration proceeding (completely new as to one of the parties) by filing a Demand for Arbitration and Statement of Claim of their own setting forth the same allegations later asserted in this Federal action; (4) they responded with their selections to two lists of proposed arbitrators submitted by the AAA and accepted the appointment of one arbitrator; (5) they sub-

mitted to the AAA an estimate of the amount of the hearing time that would be necessary to present their case; and (6) in all other respects, they knowingly, willingly and, through their attorneys, participated in the arbitration process for a period of five months prior to filing a complaint initiating this Federal action with respect to this same controversy.

Plaintiffs' principal reliance is placed on Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974). In Cobb, the Court voiced its agreement with the rule excepting a post-dispute agreement to arbitrate from the prohibition against waiver of suit read into the antitrust laws. The Court, however, disagreed with the district court's finding that the plaintiff's conduct in the arbitration proceedings constituted a sufficient basis for a determination that the plaintiff had entered into an implied or de facto agreement to arbitrate.

There is no need in this case to search for implied or de facto agreements or to seek a form of quasi-estoppel against the Plaintiffs. To the extent that Cobb requires an "eyes open" choice of the arbitration forum, such requirement has been fully satisfied. The posture of the Plaintiffs was not defensive, although Plaintiffs would now seek to have it appear as if it were. They were considering their options against ABRAHAM long in advance of ABRAHAM's first suggestion on June 20, 1974 that arbitration might be in the offing. With forethought and the advice of counsel,

Plaintiffs formally elected to arbitrate and initiated a separate arbitration proceeding of their own against ABRAHAM in which, for the first time, DIA was involved. Although Plaintiffs' demand for arbitration was dated July 12, 1974 (A-50), Plaintiffs asserted therein that they had initiated the arbitration on June 26, 1974, even before ABRAHAM initiated a proceeding against them.

Plaintiffs' acts in favor of arbitration have been unequivocal and no action was even taken by them initially in the direction of initiating a Federal action. This action was only undertaken five months after the Plaintiffs' election to arbitrate was made. Perhaps there would be some force to Plaintiffs' position if the causes of action which are asserted in its complaint in this action were not asserted in the arbitration proceeding which Plaintiffs instituted. The facts are, however, that all of Plaintiffs' claims were known to it when the election to arbitrate was made, for the complaint in this case is nothing more than the Plaintiffs' arbitration demand recast in the mold dictated by the rules applicable to litigation in the federal courts.

Rarely has a more "eyes open" forum choice been made. The Plaintiffs were expert, sophisticated and knowledgeable as to the facts underlying the dispute and the margin rules applicable thereto. They were informed, having been advised by learned counsel throughout. They had adequate time to consider their alternative courses of action, and their ex-

plicit decision to arbitrate can only be characterized as a deliberate decision, freely and knowingly taken.

CONCLUSION

The decision of the Court below determining that arbitration should be enforced and this action stayed in the meanwhile should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

Arthur Burman, Jr., being duly sworn, deposes and

says, that he is over 18 years of age. That on the *31st* day of

March, 197*6*, he served *Three (3)* of

the attached *Brief* on

the attorneys for the *Plaintiff - Ceffelloni*

herein by depositing the same, properly enclosed in a securely sealed

post-paid wrapper, in a U. S. Post Office at 90 Church Street, New

York City, directed to said attorneys at as follows:

Warren Egerton Cummings Lockwood, Esq.
1 Atlantic Street
Stamford, Conn. 06904

that being the place where they maintain ~~an~~ offices for the

regular transaction of business, and the last address mentioned in

the papers last served by *Them*

Arthur Burman, Jr.

Sworn to before me this

31st day of *March*, 197*6*.

Monroe D. Rosen

MONROE D. ROSEN
Notary Public, State of New York
No. 24-4616690
Qualified in Kings County
Commission Expires March 30, 1977